is to be noted that he admitted he was not aware of the approaching car until it was very close by, though he could not have failed to see it had he been looking ahead. That explanation seems to me at any rate the more logical and reasonable, although it is unnecessary for the court to indulge in any speculation after the plaintiff had failed to discharge the onus which lay on him. Thirdly, I do not think there was any or sufficient evidence on the record to justify the inference that the plaintiff was two or three feet from his own side of the road when he was knocked down, especially after it had been held as a fact that his "story that he was riding along the left side of the road when he was knocked down cannot be true." Fourthly, the positive evidence of the second defendant and of the plaintiff's own witness Ponnusamy — not to mention the failure on the part of the plaintiff to produce any of the children or call any evidence showing that some of them at least lived on the estate across the road — should have outweighed the evidence of the plaintiff alone regarding their dangerous behaviour.

Last and by no means the least, in a case like this, where both the plaintiff's and the defendants' story had been equally disbelieved, I think the principle enunciated in *Robins* v. *National Trust Co.*[1] should have been applied. There it was said by Lord Dunedin as follows:

> "Now, in conducting an inquiry, the determining tribunal, be it judge or jury, will often find that the onus is sometimes on the side of one contending party, sometimes on the side of the other, or as it is often expressed, that in certain circumstances the onus shifts. But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter".

Here there was no preponderence of evidence on either side.

Much as I regret the necessity, and much as I sympathise with the plaintiff upon his misfortune, I have no alternative but to allow the appeal with costs.

Barakbah L.P. concurred.

Ismail Khan J.: I have had the benefit of reading the judgment of Ong F.J. with which I am in entire agreement and have nothing to add.

Appeal allowed.

Solicitors: *Lovelace & Hastings; Athinahappan & Co.*

COMPTROLLER OF INCOME TAX v. A.B. AND COMPTROLLER OF INCOME TAX v. C.D. LTD.

[O.C.J. (Ong Hock Thye F.J.) July 15, 1966]

[K.L. — Civil Suits Nos. 1203 of 1964 and 46 of 1965]

Income Tax — Assessments — Notices — Whether Comptroller has to give particulars of sources of income — Powers of Comptroller — Income Tax Ordinance, 1947, ss. 73(2), 82, 86(3), and 91(2).

In these cases which were heard together the Comptroller of Income Tax applied to enter final judgment on a claim for income tax and penalty. In the first case the taxpayer had failed to submit his returns and assessments were therefore made by the comptroller. A certificate had been issued by the comptroller setting out the amount of tax due. In the second case, the comptroller had refused to accept the defendant's returns and had made his own assessment. It was argued by the defendant (a) that the notices of assessments did not comply with the proviso to section 73(2) of the Income Tax Ordinance, in that it did not give the sources of the income of the taxpayer; (b) that section 82 of the Ordinance conferred on the comptroller unlimited powers of assessment which he could exercise arbitrarily; (c) that the comptroller had no power to impose a penalty in the second case, as the question of the correctness of the returns had not been tested in court.

Held: (1) the comptroller had sufficiently complied with the requirements of section 73(2) of the Income Tax Ordinance by showing the chargeable income and the tax payable thereon;

(2) the comptroller had legally exercised his powers under section 82 of the Income Tax Ordinance and the certificate issued under section 86(3) of the Ordinance sufficed, on the facts of this case, for judgment to be given against both the defendants;

(3) section 91(2) of the Income Tax Ordinance gave the comptroller power to impose a penalty on the taxpayer for an incorrect return unless he satisfied the comptroller that the omission, understatement or incorrect information was made or given in good faith; and in this case the comptroller was within his rights in imposing the penalty.

Case referred to:—

(1) *A.B.C.* v. *The Comptroller of Income Tax, Singapore* [1959] M.L.J. 162, 166.

CIVIL SUIT.

Au Ah Wah (Treasury Solicitor) for the plaintiff.

K. Raja Nayagam for the defendants.

Cur. Adv. Vult.

Ong Hock Thye F.J.: By agreement of the Treasury Solicitor, appearing for the Comptroller of Income Tax, and counsel for the defendants, these two cases were heard together. There was, of course, a nexus between them. *BC*, the defendant in Civil Suit No. 1203 of 1964, admits in his defence that he had been sole proprietor of the business which was incorporated in April 1962 and thereafter became known as *C.D.* Ltd., the defendant in Civil Suit No. 46 of 1965.

In each case the plaintiffs' claim, by specially indorsed writ, is for income tax and penalty, pursuant to section 86(1) of the Income Tax Ordinance, 1947. In Civil Suit No. 1203 of 1964 the plaintiff duly applied by summons under R.S.C. Order 14, rule 2, to the senior assistant registrar for leave to sign final judgment and the same was entered, after hearing argument by counsel, on March 25, 1965. Notice of appeal to the judge was filed on March 27, 1965. By reason thereof, the plaintiff on April 2, 1965 took

out a similar summons in Civil Suit No. 46 of 1965, but the application to enter final judgment was therein made to the judge in chambers. Thus it came about that these two matters were heard together, grounds of defence common to both being as to the application of sections 73(2) and 82 of the Ordinance.

Dealing first with Civil Suit No. 1203 of 1964, particulars of the statement of claim show that $69,975 was income tax due and payable for the years of assessment 1954 to 1964 and $3,478.75 was added as penalty under section 84(1) of the Ordinance, making a total of $73,473.75.

In the affidavit filed pursuant to Order 14, rule 1, Mr. Vadivelu, an examiner in the Department of Inland Revenue, stated that the defendant, *BC*, had failed to submit his tax returns under section 59 for the years of assessment 1954-1958 and 1960-1964. An assessment was accordingly made of his tax liability under section 68(3). In respect of the year of assessment 1959 the assessment of tax was made under section 68(2)(b). Notices of assessment dated September 15, 1964 for all the years 1954-1964 were served personally on the defendant on September 16, 1964. All personal reliefs and deductions had been taken into account and made in the assessment of the defendant's chargeable income.

On October 7, 1964 the defendant submitted his returns for all the said years, together with his notice of objection. The statutory income declared in those returns were merely estimates and Mr. Vadivelu went on to state that closer examination of the defendant's assets and liabilities showed that, after taking into account all credits due to tax deducted at source from dividends, the defendant's tax liability in fact far exceeded the assessments made for the said years 1954 to 1964. Additional assessments were to follow in due course. It was further stated that after completion of investigations and ascertainment of the defendant's correct tax liability "a notice of refusal would be issued to enable the defendant to appeal to the Board of Review". Demand notices were served on the defendant on October 23, 1964. Annexed to Mr. Vadivelu's affidavit, as exhibit, was a certificate issued by the Assistant Comptroller of Income Tax, pursuant to section 86(3) of the Ordinance, which reads:

> "(3) In any suit under sub-section (1) of this section the production of a certificate signed by the comptroller giving the name and address of the defendant and the amount of tax due by him shall be sufficient evidence of the amount so due and sufficient authority for the court to give judgment for the said amount."

The defence raises various grounds, all of which, in my opinion, are just technical objections and no more. First, it was contended that the notices of assessment did not comply with the terms of the proviso to section 73(2) which lays down "that in cases of assessment the notice shall . . . . contain in substance and effect the particulars on which the assessment is made." The non-compliance alleged is that all that was shown was the chargeable income and tax thereon, but nothing was shown as to sources of such income, nor allowances made for the taxpayer, his wife and children. It was submitted that where a return was not accepted, particulars should be given as required by the above-quoted proviso to section 73(2). The identical point was raised in a case stated in the Singapore High Court, *A.B.C.* v. *The Comptroller of Income Tax, Singapore,*[1] in which a similar provision of the Ordinance of the State fell to be considered. With respect, I agree so fully with the views of Buttrose J. expressed on p. 166, in answer to the first question, that having given the reference, I shall say no more.

Secondly, it was argued, as a ground common to both cases, that section 82 confers on the comptroller unlimited powers of assessment which he can exercise arbitrarily at his will and pleasure, in contrast to the provisions of law applicable up to 1960. All I need say is that, regrettable as it may be from the point of view of the taxpayer, the function of the court is to enforce the laws enacted by Parliament and any personal views as to whether or not the relevant provisions of section 82 are oppressive are irrelevant to the determination of this question.

Thirdly, no notice of refusal to amend had as yet been given by the comptroller in Civil Suit No. 1203 of 1964 although in Civil Suit No. 46 of 1965 it was given after filing of the defence. It was submitted that Notice of Amendment or Refusal (Form D) was required under sections 72 and 75 (1)(a) as a condition precedent to the right of appeal. By delaying its issue it was contended that the comptroller has put himself in a position to produce the judgment of this court before the Board of Review and claim estoppel. With all respect to counsel, if judgment in this case is given for the comptroller merely on the strength of the certificate issued under section 86(3) I fail to see how a judgment of this court can have the effect of debarring the Board of Review from considering the defendant's objections to any assessment.

Finally, reference was made to article 8(1) of the Constitution, declaring that "all persons are equal before the law and entitled to equal protection of the law." It was argued that section 82 results in the practice of undue discrimination in favour of the State against the individual, because the comptroller can take action to enforce payment of a tax claim even before an appeal comes up for consideration

by the Board of Review. In my view, the question does not arise. The comptroller, in making his assessment, is required by section 68 to do so "to the best of his judgment" and there can be no presumption of his failure to do so.

The certificate under section 86(3) sufficed, on the facts of this case, for judgment to be given by the senior assistant registrar. The appeal is dismissed with costs.

Turning now to Civil Suit No. 46 of 1965, the plaintiff had refused to accept the defendant's returns and assessed the defendant for the years of assessment 1962 and 1963 under section 68(2)(b) of the Ordinance. The assessed tax for 1962 was $9,600 and for 1963 $14,400. The penalty added under section 91(1) was $9,600 for 1962, and $4,800 for 1963, making a total of $39,600.

It was contended that section 91(1) does not empower the comptroller to impose any penalty because a penalty necessarily postulates an incorrect return; that the question whether a return is incorrect in any way is one for the court to decide; and that, once a taxpayer denies he has made an incorrect return, the question must go before the court and the court only. With respect, I think subsection (1) has been confused with subsection (2). The first imposes a penalty on the taxpayer for an incorrect return "unless he satisfied the comptroller" that the omission, understatement or incorrect information was made or given in good faith. The second plainly relates to prosecutions for the offence of making incorrect returns, where the court has to be satisfied of the defendant's good faith in order that a defendant should be allowed an acquittal.

Secondly, it was argued that as the defendant company had only commenced business in May 1962, its first financial year was from May 1, 1962 to April 30, 1963. The defendant on January 26, 1965, after notices of assessment given, had elected to be assessed under section 31(3)(d) and it was stated that "the tax payable for the assessment years 1962 and 1963 is at present unknown". That, of course, was the reason for assessment being made, by the comptroller "to the best of his judgment" under section 68(2)(b). This unfortunate situation should not have arisen had the defendant kept proper accounts and duly sent in returns, in which case there would have been no call for any assessment to be made. As to the question of election, I agree with the plaintiff's submission that section 31(3)(d) has no effect on an assessment raised for the first year of assessment in respect of a new source of income, which is the year of assessment 1962, pursuant to section 31(3)(a). I further agree that section 31(3)(d) applies only to determine the second and third years of assessment taken together and does not have the effect of offering any obstacle to tax collection.

The grounds raised by the defence having reference to section 82 and the proviso to subsection (2) of section 73, have been dealt with and do not need repetition.

Again, the certificate issued under section 86(3) is sufficient for present purposes and I would enter judgment for the plaintiff as prayed. I make no special order for costs on the counterclaim, which was withdrawn.

Judgment for the plaintiff.

MAT BIN LIM & ANOR. v. HO YUT KAM & ANOR.

[O.C.J. (Raja Azlan Shah J.) July 15, 1966]

[Raub — Civil Suit No. 37 of 1965]

Practice and Procedure — Pleadings — Application to strike out statement of claim — Limitation — Acknowledgment of liability — Not pleaded in statement of claim — Civil Law Ordinance, 1956, s. 8(3) — R.S.C., 1957, O. 25, r. 4.

The plaintiffs brought an action to recover damages for personal injuries in respect of a road accident. The defendants in their defence pleaded that the plaintiff's claim was barred by limitation by virtue of section 8(3) of the Civil Law Ordinance, 1956. In their reply, the plaintiffs alleged that there had been an acknowledgment of liability. The defendants applied for the plaintiffs' statement of claim to be struck out on the ground that it disclosed no reasonable cause of action.

Held: the acknowledgment should have been pleaded in the statement of claim and as this was not done, the application for the statement of claim to be struck out must be allowed.

Cases referred to:—

(1) *Kuan Hip Peng* v. *Yap Yin & Anor.* [1965] 1 M.L.J. 252, at p. 255.

(2) *Lubovsky* v. *Snelling* [1944] 1 K.B. 44, 47.

(3) *Cohen* v. *Snelling* [1943] 2 All E.R. 577.

CIVIL SUIT.

Harbans Singh Sidhu for the plaintiffs.

R. Talalla for the defendants.

Cur. Adv. Vult.

Raja Azlan Shah J.: This is an application by the defendants by way of summons in chambers for an order to strike out the plaintiffs' statement of claim under Order 25 rule 4 of the Rules of the Supreme Court on the ground that it discloses no reasonable cause of action or is frivolous and vexatious and an abuse of the process of the court.

The points for determination are these. Firstly, when a plaintiff who is seeking by action to recover damages for personal injuries in respect of a road accident relies upon an acknowledgment of liability by the insurance company, does that acknowledgment constitute